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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY BURNETT,

Defendant and Appellant.

G049656

(Super. Ct. No. 09NF3530)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Robert V. Vallandigham, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette C. Cavalier, and Alastair J. Agcaoili, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Burnett appeals from a judgment after a jury convicted him of possession of a firearm by a felon, carrying a loaded unregistered firearm in public, active participation in a criminal street gang while carrying a loaded firearm in public, and misdemeanor resisting an officer. Burnett argues the trial court erred in instructing the jury and compounded that error when it improperly replied to a jury question. Neither of his contentions have merit, and we affirm the judgment.

FACTS

In December 2009, Officer Daniel Gonzalez stopped a car in a public parking lot after observing two vehicle code violations. Joe Harris was in the driver's seat, and Burnett was in the front passenger's seat. Anthony Hill and Andre Clayton were in the vehicle's rear passenger seats.

Gonzalez approached the car and announced he was a police officer and the purpose of the stop. As he made this announcement, he saw Burnett bend forward in his seat as if to grab or conceal something. Gonzalez, who was concerned, approached the driver's side of the car and asked to see Harris's driver's license and registration. He asked Harris to exit the car and, with Harris's consent, searched him. Finding nothing illegal, Gonzalez asked Harris to sit on the front bumper of the patrol vehicle.

Officer Jeff Coursey arrived. Concerned with Burnett's movements and the other occupants' nervous behavior, Gonzalez asked Coursey to request backup. As they waited for backup, Gonzalez determined Burnett was on parole. Gonzalez asked Burnett to get out of the car and accompany him to his patrol vehicle to conduct a parole search.

As they walked towards the patrol vehicle, Burnett broke free from Gonzalez and ran. Gonzalez attempted to grab Burnett, but Burnett struck him hard in the chest, first with his left elbow and then with his right. Coursey also attempted to grab Burnett, but Burnett escaped.

When Gonzalez eventually caught Burnett and grabbed his shirt, Burnett reached into his waistband. As they wrestled, a Glock semiautomatic handgun with an

attached laser sight fell from Burnett's waistband onto the pavement. The officers subdued and handcuffed Burnett. Gonzalez radioed for emergency assistance.

Officers subsequently found a second firearm, an Accu-Tek semiautomatic handgun, in the glove compartment. Both handguns were loaded. The Accu-Tek handgun was registered to Harris.

A third amended information charged Burnett with the following offenses occurring on December 6, 2009: count 1-possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1); all further statutory references are to the Penal Code, unless otherwise indicated); count 2-active gang member having a concealed firearm (§ 12025, subds. (a)(2) & (b)(3)); count 3-carrying a loaded unregistered firearm in public (§ 12031, subd. (a)(1) & (2)(f)); count 4-resisting and deterring an executive officer (§ 69); count 5-street terrorism (§ 186.22, subd. (a)); and count 6-active participant in a criminal street gang carrying a loaded firearm in public (§ 12031, subds. (a)(1) & (2)(c)).¹ The information alleged Burnett committed all but count 5 for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The information alleged Burnett suffered a prior serious and violent felony (§§ 667, subds. (a)(1), (d) & (e)(1), 1170.12, subds. (b) & (c)(1)), and one prior prison term (§ 667.5, subd. (b)).

Deputy Sheriff Joshua Manjarrez, a criminal street gang expert, concluded that at the time of this incident, Burnett, Harris, Hill, and Clayton were all members of the Dorner Blocc Crips, an active criminal street gang. He formed his opinion on the gang members' prior contacts with law enforcement officers and admissions. Based on a

¹ Former sections 12021, 12025, and 12031 were carried over without substantive change in sections, 29800, 25400, and 25850 respectively. (Nonsubstantive Reorganization of Deadly Weapon Statutes (June 2009) 38 Cal. Law Revision Com. Rep. (2008) pp. 514 [§ 12025], 538-539 [§ 12031], 758 [§ 12021].) All references to sections 12021, 12025, and 12031 are to their former designations.

hypothetical mirroring the facts of the case, he explained the criminal conduct would promote, further, or assist criminal activity by the gang.

Steven Strong, a retired police detective, testified on behalf of the defense that in his opinion, Burnett was not an active gang member at the time of the alleged offenses, and the offenses themselves were not gang related. Strong acknowledged, however, that he had never investigated the Dorner Blocc Crips. Strong admitted Harris, Hill, and Clayton had tattoos of the Dorner Blocc Crips founder who was deceased and those tattoos were gang related.

During a discussion on jury instructions, the trial court indicated defense counsel requested jury instructions concerning the gang offense and enhancements that the Judicial Council was then revising in response to *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*). The court indicated it did not “really have authority to use instructions that might come in at some point in time.” Defense counsel indicated he was not requesting the instructions the Judicial Council was then reviewing but contended the court should amend the instructions, CALCRIM Nos. 1400 and 1401, to reflect the holding in *Rodriguez*—to be guilty of violating section 186.22, subdivision (a), a defendant must be with one or more gang members or associates. The court stated it would instruct the jury with the then current CALCRIM Nos. 1400 and 1401, and counsel was “welcome to argue the law as it currently exists.” Counsel said he was concerned the prosecutor might argue the jury could find Burnett guilty of count 5 even if he was the only gang member in the car, which was an incorrect statement of the law. The court stated: “What you’re both going to do is you’re going to argue the law. You’re going to argue the law. We all know what *Rodriguez* says. . . . [¶] . . . And I don’t believe the prosecution is going to argue that that’s not the law. It is the law. The law is what it is. We deal with it.”

The trial court instructed the jury with the following instructions:
CALCRIM No. 2511 (count 1); CALCRIM Nos. 2530 & 2545 (count 3);

CALCRIM Nos. 2652 & 2656 (count 4); CALCRIM No. 2542 (counts 2 & 6); CALCRIM No. 1400 (count 5); CALCRIM No. 1401 (gang enhancements); and CALCRIM No. 207 (date of offenses). As relevant here, CALCRIM No. 1400, count 5, and CALCRIM No. 2542, counts 2 and 6, stated the second element of active gang participation as follows: “The defendant willfully assisted, furthered, or promoted felonious criminal conduct by *members* of the gang” (Italics added.)

Counsel presented closing arguments. Burnett’s defense counsel conceded he was guilty of counts 1, 3, and 4. Counsel vigorously disputed the gang offenses and enhancements.

During jury deliberations, the jury asked the trial court five questions, two of which are relevant on appeal. The jury asked the trial court to identify the instruction applicable to count 2. The trial court responded: “Review all of your instructions. #2542 may be of assistance to your question.” Later, the jury inquired about the instruction applicable to the substantive offense of street terrorism in count 5, CALCRIM No. 1400. The request noted the first element requires the defendant to have “actively participated,” noting it was phrased in the past tense. The jury asked, “Does the above [actively *participated*] refer to events [and] participation on [December 6, 2009], or any participation prior to that date, perhaps years before?”

At a hearing, the trial court indicated it and counsel had a lengthy unreported discussion about how the court should respond and it was inclined to advise the jury to follow the instructions but defense counsel preferred a more specific response. Defense counsel asserted the court should instruct the jury count 5 applied to conduct on December 6, 2009. The court indicated it was reluctant to provide a specific answer and noted the problems juries had been having with the substantive offense of street terrorism. The court said, “I don’t know if it has to do with *Rodriguez* or what, but juries don’t know about *Rodriguez*.” The court ruled it would instruct the jury to “just stay with

the law.” The trial court replied to the jury as follows: “Please follow the jury instruction as given to you and follow the law based on the evidence as you find it to be.”

The jury convicted Burnett of counts 1, 3, and 6 but acquitted him of counts 2, 4, and 5. As to count 4, the jury convicted him of the lesser included offense of misdemeanor resisting an officer. The jury found not true the gang enhancements as to counts 1, 3, and 6. Burnett filed a motion for a new trial on count 6 on the ground the trial court erred in failing to answer the jury’s question. The motion was supported by a declaration from counsel concerning his posttrial conversation with jurors about their last question and confusion over count 6. The prosecutor opposed the motion. The court denied the motion.

After Burnett admitted he suffered the prior convictions, the trial court sentenced Burnett to prison for 11 years as follows: six years on count 1 and a consecutive five years on the prior serious felony conviction. The court suspended the sentence on count 4, a misdemeanor, and the section 667.5, subdivision (b), enhancement. Pursuant to section 654, the court imposed and stayed the sentences on counts 3 and 6.

DISCUSSION

I. Jury Instructions

Burnett argues the trial court prejudicially erred by failing to properly instruct the jury on count 6. Not so.

The street terrorism substantive offense, section 186.22, subdivision (a), states: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by *members* of that gang, shall be punished . . . in the state prison for 16 months, or two or three years.” (*Italics added.*)

In *Rodriguez*, *supra*, 55 Cal.4th at pages 1128-1129, defendant acted alone in committing an attempted robbery. A jury convicted him of attempted robbery and active participation in a criminal street gang under section 186.22, subdivision (a). The issue in *Rodriguez* was whether the element of willfully promoting, furthering, or assisting in any felonious criminal conduct by members of the defendant's gang—can be satisfied by felonious criminal conduct committed by the defendant acting alone. (*Rodriguez*, *supra*, 55 Cal.4th at p. 1129.) The court reasoned “[t]he plain meaning of section 186.22[, subdivision] (a)[,] requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member. [Citation.]” (*Id.* at p. 1132.) Because the defendant acted alone, he did not violate section 186.22, subdivision (a). (*Rodriguez*, *supra*, 55 Cal.4th at p. 1139.)

“[A]n erroneous instruction that omits an element of an offense is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18 [(*Chapman*)]. [Citations.] [T]he *Chapman* test probes ‘whether it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”’” (*People v. Gonzalez* (2012) 54 Cal.4th 643, 663 (*Gonzalez*)). Thus, “even when jury instructions completely omit an element of a crime, and therefore deprive the jury of the opportunity to make a finding on that element, a conviction may be upheld under *Chapman* where there is no ‘record . . . evidence that could rationally lead to a contrary finding’ with respect to that element.” (*People v. Davis* (2005) 36 Cal.4th 510, 564.)

Burnett contends the trial court erred because it did not modify CALCRIM No. 2542 (and CALCRIM No. 1400 by implication), to reflect the *Rodriguez* court's holding active gang participation requires conduct committed by two or more gang members. Additionally, Burnett seems to assert the court erred in failing to instruct the jury on the elements of count 6 (and count 2).

We recognize the Judicial Council revised CALCRIM Nos. 2542 and 1400 to reflect the *Rodriguez* court's holding after the trial in this matter. (*People v. Vega*

(2015) 236 Cal.App.4th 484, 505 & fn. 11.) Both instructions now include the following language: “At least two gang members of that same gang must have participated in committing the felony offense. The defendant may count as one of those members if you find that the defendant was a member of the gang.” At the time of trial, however, the relevant portion of the instructions stated “*members* of the gang.” That language matches section 186.22, subdivision (a)’s requirement the defendant must have willfully promoted, furthered, or assisted in any felonious criminal conduct by “*members* of that gang.” The language of a statute defining a crime is generally a sufficient basis for an instruction. (*People v. Smithey* (1999) 20 Cal.4th 936, 980-981.)

In any event, Burnett was not prejudiced by the trial court’s decision to not modify the instructions. There was ample evidence Burnett did not act alone when he carried the loaded firearm in public. Manjarrez opined that at the time of the incident Burnett, Harris, Hill, and Clayton were all members of the Dorner Blocc Crips. And Burnett’s gang expert, Strong, admitted Harris, Hill, and Clayton all had tattoos relating to Dorner Blocc Crips. This issue was not seriously contested. During closing argument, the prosecutor did not suggest the jury could convict Burnett of count 6 even if he acted alone. And Burnett concedes his defense counsel did not argue this issue. Therefore, we conclude ““beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.” [Citations.]” (*Gonzalez, supra*, 54 Cal.4th at p. 663.)

With respect to Burnett’s suggestion the trial court did not instruct the jury on the basic elements of count 6, we disagree. Count 3 alleged Burnett carried a loaded unregistered firearm in public. Count 6 alleged Burnett was an active participant in a criminal street gang who carried a loaded firearm in public (§ 12031, subds. (a)(1) & (2)(c)). As to count 3, the court instructed the jury with CALCRIM No. 2530, “Carrying a Loaded Firearm,” which properly set forth the elements of that offense. As to count 6, the court instructed the jury with CALCRIM No. 2542, “Carrying Firearm: Active Participant in Criminal Street Gang,” which stated that if the jury found Burnett guilty of

carrying a loaded firearm, it had to determine whether he was an active participant in a criminal street gang. Read together, these instructions properly instructed the jury on the required elements of count 6. (*People v. Whalen* (2013) 56 Cal.4th 1, 61.)

We recognize the jury's not guilty verdict on counts 2 and 5 are not entirely consistent with its verdict on count 6, but there is no prohibition against inconsistent verdicts. (*People v. Avila* (2006) 38 Cal.4th 491, 600 [inconsistent verdicts allowed to stand because possible result of jury mistake, compromise, or lenity].) Finally, the length of the jury's deliberations does nothing to undermine our confidence in the verdicts.

II. Jury Question

Burnett contends the trial court erred when in response the jury's question concerning active gang participation, the court instructed the jury to follow the instructions and the law. Again, we disagree.

"The jury's request for further clarification triggered section 1138. The statute provides in relevant part: 'After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given' [Citation.] 'This means the trial "court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.]" [Citation.]" (*People v. Montero* (2007) 155 Cal.App.4th 1170, 1179.)

Preliminarily, we note the jury's questions related to count 5, the substantive offense of street terrorism, and CALCRIM No. 1400. The jury acquitted Burnett of that count. In any event, CALCRIM No. 1400 when read together with

CALCRIM No. 207, properly instructed the jury the crimes occurred “on or about December 6, 2009.” The court’s response was proper.

To the extent the jury’s question related to count 6 and CALCRIM No. 2542, the trial court’s response was also proper. As it related to the active participant element, CALCRIM No. 2542 stated, “When the defendant carried the firearm or caused the firearm to be carried concealed in a vehicle[], the defendant was an active participant in a criminal street gang[.]” This language made clear the jury had to conclude Burnett was an active participant in Dorner Blocc Crips on the day of the incident. Thus, the trial court’s response to the jury to follow the instructions as given was proper.

DISPOSITION

The judgment is affirmed.²

O’LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

IKOLA, J.

² We note Burnett’s opening briefs do not include page 20 but includes two of page 30. The court obtained page 20 from the electronic version of the brief that appellate counsel filed with the court.